DCCUMENT RESUME

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)ecision re: Raymond A. Allen; David Lee Bradley; Basil O. Toney ; James A. Hauser; by Robert F. Keller, Acting Comptroller General.

:ssue Area: Personnel Management and Compensation: Compensation (305).
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Budget Function: General Government: Central Personnel Management (805).
)rganization Concerned: General Services Administration.
Authority: 53 Comp. Gen. 489. 53 Comp. Gen. 492, 493. Eugie L. Baylor et al. v. United States, 198 Ct. Cl. (1972).

Stan Gregg, Director of the Finance Division, General Services Administration, requested a decision concerning four employees' claims for overtime compensation for the time required to perform preliminary and postliminary activities relating to their guard duties. Definite amounts of duty-free breaktime may be aggregated to offset employee claims of overtime. (SW)

Ms. Hubert
Civ.Pers.

3845

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

03546

FILE: B-188687 DATE: September 21, 1977

MATTER OF: Raymond A. Allen, etal. - Overtime for General Services Administration Guards

DIGEST: 1. Under decision in Baylor v. United States, 198 Ct. Cl. 331 (1972), employing agency has burden of proof to establish that workbreaks away from post of duty are taken by employees under such circumstances as would entitle employer to offset breaktime against employee claims of overtime. Employee may rebut setoff by establishing through competent evidence that breaks were not available or that breaktime was substantially reduced by responding to emergency calls. However, mere fact that employee is on call and restricted to premises will not defeat setoff.

2. Definite amounts of duty-free breaktime may be aggregated for setoff purposes because Court of Claims has held that breaktime consists of regular period of definite amount of time when employee is not actually required to perform regular duty at his post. Thus, two break periods each day of 15 minutes taken by employee may be aggregated by employer to form 30 minutes for setoff purposes.

By a letter dated March 23, 1977, Mr. Stan Gregg, the Director of the Finance Division of the General Services Administration (GSA), Region 3, has requested our decision concerning the claims of Messrs. Raymond A. Allen, David Lee Bradley, Basil O. Toney, and James A. Hauser. The claimants, all employees of GSA's Federal Protective Service (FPS), claim overtime compensation for preliminary and postliminary activities in accordance with the holding by the Court of Claims in Eugie L. Baylor et al. v. United States, 198 Ct. Cl. 331 (1972) and our decision at 53 Comp. Gen. 489 (1974).

I. Background

Finding that the overtime activities involved in Baylor had been officially ordered and approved by appropriate GSA officials, the Court of Claims held that each of the plaintiffs who testified and presented evidence was entitled to recover insofar as he had substantiated his claim. In 53 Comp. Gen. 489, supra, we authorized payment of the

claims of FPS officers for overtime compensation for the time required to travel between the gun control point and post(s) of duty, to obtain and replace a firearm where a guard is required to obtain a firearm at a location other than his post of duty, and in the case of supervisors, for the time required to perform necessary preliminary and postliminary supervisory responsibilities. We provided, however, that payment would be allowable only where the claim was properly verified as to the guard's duties and as to the location of the control points and posts of duty, where the claimed traveltime was reasonable as to amount, and where the total reasonable time involved in preliminary and postliminary activities exceeded 10 minutes per day after setoff of aggregate duty-free periods.

Based upon the above authorities, in 1974, GSA considered the claims of members and former members of the FPS for overtime compensation. In paying allowable claims during 1974, GSA made no setoff for duty-free lunch periods because the claimants certified that they were not given such periods and GSA was unable to rebut such certifications due to a lack of appropriate records. Regarding the period since early 1974, GSA has obtained signed statements by supervisory personnel which indicate the usual post assignment for each employee and the lunch arrangement for such post under normal conditions.

In the present case, the four claimants are presenting claims from dates in early 1974, to August 14, 1976, when GSA changed its payroll procedure so that overtime may be paid each pay period. These claims are similar to approximately 1,000 other claims made by FPS personnel against GSA for the period between the original payment of claims by GSA in 1974, until the institution of the revised payroll procedure on August 14, 1976. Since it has obtained certification from supervisory personnel concerning break periods taken by the claimants, GSA has requested our decision as to the propriety and manner of offsetting the lunch breaks against the claimed overtime activities.

II. Legal Guidelines

We note at the outset that in each of the four claims, the employee has identified the locations where he worked during the claim period, and established the percentage of the claim period during which he was assigned to each location. Concerning the number of minutes allowed

for the obtaining and replacement of weapons, and for travel-time between the control point and duty post, the amount of time claimed by each of the four employees have, to some extent, been adjusted in accordance with standards of reasonableness developed by GSA. These standards are based on the actual time required by five teams, each consisting of an FPS employee and a GSA management representative, to perform the preliminary and postliminary activities in each work situation. In Baylor the Court of Claims held that the establishment of reasonable maximum average times was a permissible means to settle these claims. Baylor at 353. In 53 Comp. Gen. 489, 493, supra, we held that the Court of Claims did not require the use of the averaging technique where other evidence of the required time is available. Thus, we sanctioned the use by GSA of reasonable maximum times based upon actual experience. Since in the present case, GSA has computed the times for each separate post of duty, and has included FPS guards in the actual timing thereof, we have no objection to the standard times considered reasonable by GSA for each post of duty.

The central issue in this matter is whether in each case, the employee both was granted and took break periods which may be setoff by GSA against the claimed overtime. As set forth in Findings of Fact Number 75 in Baylor, the burden of proof is placed on GSA in each case to establish that the workbreaks in question were taken under such circumstances as would entitle GSA to setoff such time against the claimed overtime. In deciding when a setoff may legally be made, the court held:

> "Therefore, under the circumstances in this case, when the employer makes lunch break time available, and the employee actually takes advantage of such privilege, such time may offset otherwise compensable preshift or postshift hours of work. This is true even when such breaktime is not regularly scheduled so long as it is regularly taken; and it applies when the employee is nevertheless subject to emergency call unless he has shown that responding to such calls substantially reduced his duty free time.

> "Where applicable, such away-from-post lunch breaks will offset an equal amount of compensable overtime. Such offset will operate only in the cases where the employee was actually permitted to leave his post for his lunch break. In all other cases, eating lunch and the performance of regular duties are so intertwined so as to prohibit the finding that the 'break' was the employee's own and thus could operate as an offset." 198 Ct. Cl. at 365.

Thus, in order to be entitled to an offset, the burden of proof is placed on GSA to establish that the employee actually took advantage of available workbreaks away from his post of duty. Further, an employee may rebut and defeat the agency's claim to an offset by establishing that breaks away from the duty post were not made available, or if they were, that the breaktime was substantially reduced by responding to emergency calls. Where, however, GSA can establish that the employee was afforded breaktime away from his post, the mere fact that the employee was on call and not permitted to leave the building or premises will not defeat a setoff for breaks unless the employee demonstrates that the breaktime was substantially reduced by responding to calls.

III. Opinion

The submission accompanying the March 23, 1977, GSA request for a decision included statements describing the general deployment of guards and the relief policies in each building which was the subject of an overtime claim by the four claimants here. The statements are certified by supervisory personnel and set forth generally whether the employee was permitted to leave his post for breaks and the amount of time customarily taken on breaks. In a letter dated May 4, 1977, Mr. Richard A. Simms, Chief, Shop Steward of Local 1733, American Federation of Government Employees (AFGE), challenged the statements on the grounds that the certifying supervisory officers were not stationed in the areas covered by the statements at all times relevant to the claim period. In response, GSA has furnished additional certifications so that the record contains statements concerning lunch break policy by personnel who supervised each location during the period covered by the claims.

The full case file concerning each claim was subsequently furnished to each of the four claimants in order that they might submit an affidavit concerning the regularity and duration of lunch or other breaks, and the specific place at which they were able to take such breaks. In addition, the claimants were informed that they could submit additional independent supporting evidence. Our decision in this case, therefore, is based upon consideration of the materials submitted by GSA, AFGE Local 1733, and the claimants.

Mr. Raymond A. Allen claims overtime compensation for the period from June 10, 1974, to August 15, 1976. For 40 percent of that period, he was assigned to posts of duty at which GSA concedes that he was not granted any lunch break. Since the average reasonable additional duty time for that period was computed in accordance with the decision in Baylor, and there is no setoff available as to such duty posts, Mr. Allen may be paid for the reasonable additional duty time as set forth in the submission.

In addition to the above duty post assignments, Mr. Allen was stationed in Washington, D.C., at 1717 H Street, N.W., on the second relief for 40 percent of the claim period, and at 810 Vermont Avenue, N.W., for 20 percent of the period. Acting on Mr. Allen's behalf, AFGE Local 1733 submitted to our Office a copy of a certification dated February 16, 1977, signed by Captain Calvin Taylor, Commander of Zone 1, District 1, indicating that the second relief guards stationed at 1717 H Street, N.W., did not receive a break while assigned to that building. Since that document conflicted with another statement signed by Captain Taylor or March 16, 1977, to the effect that men stationed at that building were allowed 20-30 minutes to eat at "space provided other than their post of duty," we sought clarification of the matter. As a result, we have been informed by Captain Taylor that, concerning the period of time during which he has exercised supervision over guards assigned to that building, the February 16, 1977, statement was correct. Since Captain Taylor exercised such supervision from March 30, 1975, to August 15, 1976, Mr. Allen may be considered to have had no breaktime for that period at 1717 H Street, N.W., and may be paid for overtime in the amount found due. Concerning the period prior to March 30, 1975, Lt. James M. Hairston has certified that men were permitted 20-30 minutes for breaks away from their posts. Since the Baylor decision requires that the period of duty-free time be definite as to amount, only the

lower figure of 20 minutes may be used for setoff purposes. Because that amount completely offsets the 12 minutes of overtime worked, no additional overtime may be paid for the period prior to March 30, 1975, at 1717 H Street, N.W.

American Federation of Government Employees Local 1733 has raised an additional argument concerning the issue of setoff in the case of Mr. Allen, which would also be applicable to all similarly situated employees. Demonstrating that in many locations, thousands of hours of overtime were worked by guard personnel in fiscal years 1975 and 1976, the union contends that working conditions were not normal. It is thus argued that GSA may not prevail on the issue of setoff because in many instances the guards were not permitted to leave their posts. In a letter dated July 15, 1977, to this Office, GSA has responded that the overtime payments "attest to the fact that overtime was paid during this period as it was worked obviating the necessity for the submission of retroactive claims. This indicates that officers not being relieved for meals were paid for additional time worked." It is our view that in the absence of evidence directly indicating that by reason of overtime worked, the guards were not permitted to leave their posts for breaks, the union may not prevail on this argument.

Thus, concerning the claim of Mr. Allen, payment should be certified in accordance with the foregoing. We note that no information was provided concerning the amount of time necessary for Mr. Allen to obtain and return a firearm, nor is it clear whether such time is claimed by him. If such time is claimed and has inadvertently been omitted from the submission, that time should be added to the compensable overtime which may properly be paid.

Regarding the claim of Mr. David Lee Bradley, GSA has determined by appropriate computations that he performed 13 minutes of preliminary and postliminary duty each day during the claim period. However, GSA has stated that he is provided an aggregate of 40 to 45 minutes of duty-free breaks away from his post. Since, as noted above, the Baylor decision requires that the period of duty-free time be definite as to amount, only the lower figure of 40 minutes may be used for setoff purposes.

In response to GSA's claim, Mr. Bradley contends that the supervisors who submitted certification were either not assigned

to his zone at the time of his claim, or were not on his shift. As in the case of Mr. Allen, this issue was referred to GSA, which has submitted additional statements certified by supervisory personnel who evidently were assigned to Mr. Bradley's zone through the claim period. In addition, Mr. Bradley contends that a setoff should be denied because while taking breaks, he was on call and was required to take the break at designated locations. As noted above, the Baylor decision specifically holds that the mere fact that the employee was on call and restricted to the premises while taking a break away from his post will not, in itself, prevent the employer from taking a setoff for such breaks. See 198 Ct. Cl. at 365. Finally, Mr. Bradley states that during the claim period, there was a shortage of personnel and occasional extraordinary events which interferred with the normal operation of the relief policy. However, the standard enunciated by the Court of Claims in Baylor is that responding to emergency calls must substantially reduce the employee's duty-free breaktime. Since Mr. Bradley was able to take breaks most of the time and since responding to emergency calls was required only occasionally, we cannot conclude that his breaktime was substantially reduced. Accordingly, the 40 minutes of duty-free time may be setoff against the claimed 13 minutes of duty-free time, thus barring recovery by Mr. Bradley on his claim.

Mr. Basil O. Toney claims overtime compensation for the period from March 26, 1974, through August 14, 1976. For 98 percent of that period, he was assigned to posts of duty at which GSA states that he was given two breaks daily of 15 minutes each. In a statement dated July 5, 1977, Mr. Toney objects to setting off the two breaks of 15 minutes each on the grounds that such breaks do not constitute a one-half hour duty-free lunch break. Thus, the threshold issue presented is whether definite amounts of duty-free breaktime may be aggregated for setoff purposes. In Baylor, the Court of Claims described breaktime as a regular period of 30 minutes or any other lesser definite amount of time each workday when the employee is not actually required to perform regular duties at his assigned post. Accordingly, we have held that the duty-free break periods regularly taken by an employee should be aggregated to determine the daily total of breaktime which may be setoff against additional duty time. 53 Comp. Gen. 489, 492, supra. Thus, the two 15 minute break periods each day afforded to Mr. Toney may be aggregated for setoff purposes.

In addition, Mr. Toney has argued that his breaks were interrupted on a daily basis, stating that his immediate supervisor can

verify such interruptions. However, Mr. Toney has not submitted a statement from the supervisor and we are unable to ascertain the extent to which interruptions occurred. Accordingly, we are unable to conclude that Mr. Toney's break periods were substantially reduced by responding to duty assignments. Since the break period may be aggregated to total 30 minutes each day, such time completely offsets the 8 minutes of average reasonable duty time claimed by Mr. Toney.

For 2 percent of the total claim period, however, Mr. Toney was assigned to a post at which no duty-free break was provided and where he was required to perform 10 minutes of additional duty daily. Payment of overtime compensation is, therefore, allowable as computed by GSA for this latter assignment.

Mr. James A. Hauser claims overtime compensation for an average of 13 minutes of additional daily activity for the period from May 28, 1974, to August 14, 1976. GSA has submitted a statement certified by Lt. Robert L. Green indicating that Mr. Hauser was provided a 30-minute break daily during the claim period. Mr. Hauser, however, notes that the administrative report also contains a statement signed by Captain Edward B. King, who was Mr. Hauser's commanding officer, to the effect that only a 20-minute break was permitted. In view of the burden placed on GSA concerning the setoff issue, the conflicting statements indicate that only the lesser amount, 20 minutes per day, may be considered for setoff purposes. In addition, Mr. Hauser has argued that his breaktime is not duty-free because he is required to take the break in his locker room and is on call at all times. As noted above, the mere fact that the employee was on call and restricted to the premises while taking a break away from his post will not prevent the employer from taking a setoff for such break. Finally, although Mr. Hauser contends that his lunch period was frequently interrupted, he notes that he is unable to document such interruptions. We are, therefore, unable to conclude that Mr. Hauser's breaktime was substantially reduced, as required by the Baylor decision. Since Mr. Hauser was thus furnished a duty-free break period of 20 minutes daily throughout the period of his claim, the additional duty time is completely offset, and no amount of the claim may be paid.

B-188687

Disposition of these and similar claims may be made by GSA in accordance with the above.

Acting Comptroller General
of the United States